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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1194

MORAN OIL PRODUCING AND DRILLING CORPORATION,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on September 30, 1970 and that it be considered in conjunction with the case of Rod Ric Corporation vs. National Labor Relations Board in the Fifth Circuit wherein a Writ of Certiorari was applied for on October 10, 1970, Docket No. 822; and the combined cases of Tri-Service Drilling Company vs. National Labor Relations Board and Brahaney Drilling Company vs. National Labor Relations Board, out of the Fifth Circuit Court of Appeals for which a Writ was applied for on December 23, 1970.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit enforcing the Board's order is reported at F.2d and a copy thereof is appended to this Petition in the appendix at pp. 14a to 20a. The Court's order denying Petition for Rehearing was entered on December 1, 1970 and a copy of such order is appended to this Petition in the appendix at p. 22a. A thirty-day Stay of Mandate was granted on December 1, 1970.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on September 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

The NLRB conducted a union election in connection with Petitioner's business and by order of its Regional Director pursuant to a prior order of the Board in the *Hondo Drilling Company, N.S.L.*, (164 NLRB No. 67, May 8, 1967), allowed non-employees to vote. Company timely filed objections to the conduct of the election but was overruled and denied a hearing on its objections. Company filed request for review with the Board but it was denied by a telegram. Company refused to bargain and the Board filed a refusal to bargain complaint. Company's answers clearly set out fact issues which require a hearing. The Trial Exam-

mer granted the Board a summary judgment and the Board sustained the Trial Examiner, over objection by the company. The Board sought enforcement in the Tenth Circuit Court of Appeals. The Court enforced the Board's order without considering some of the issues raised by the pleadings of this Petitioner. The questions presented are:

1. Whether the NLRB has the power to force a union on employees by the expedient method of making non-employees eligible to vote, permitting non-employees to vote, and denying employers the right to challenge such non-employee voters?

2. Whether the Tenth Circuit Court of Appeals may properly enforce the Board's order without consideration of all the defenses raised by Respondent company, Petitioner herein.

3. Whether summary judgment procedure is authorized under the National Labor Relations Act or the Administrative Procedure Act when the pleadings raise fact-issues.

4. Whether the Board may legally overrule Petitioner's Objections to the conduct of the election without substantial evidence in the record.

5. Whether the NLRB is required to follow the rule-making procedure of the Administrative Procedure Act when it establishes a voting eligibility rule for an entire industry in the Permian Basin contrary to its usual rules of eligibility.

6. Whether the NLRB is required to follow the spirit as well as the letter of the *Excelsior Underwear, Inc.*, (156 NLRB 1236) rule when employer has no direct access to persons no longer employed but made eligible to vote.

7. Whether the foregoing acts of the NLRB and the Tenth Circuit Court of Appeals has denied Petitioner and its employees a full and fair hearing, and or denied them their rights under the National Labor Relations Act, and or denied them the protection of the due process of law guaranteed them by the Fifth Amendment to the Constitution of the United States, the Administrative Procedure Act and the Board's own rules and regulations.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent parts of the Fifth Amendment of the United States Constitution, Labor Management Relations Act (hereinafter called the "Act"), 1947, as amended (29 U.S.C. 152(3), 157, 159(a), 159(b), 159(c), 159(d), 160(a), 160(b), 160(c), 160(e)); Administrative Procedure Act (hereinafter called "APA") (5 U.S.C.A. Sections 552(a) (1) (D) and (E), 553, and 554; and Paragraphs 11,338 through 11,338.5, 11,340 through 11,340.3 of National Labor Relations Board Field Manual, are set forth in the Appendix at pp. 1a to 13a.

STATEMENT

This case arose on the application of the NLRB for enforcement of an order issued against Moran Oil Producing and Drilling Corporation, Petitioner herein, pursuant to Section 10e of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.).

The NLRB, on the basis of the employment circumstances of one small drilling contractor in the Permian Basin of West Texas, Hondo Drilling Company, N.S.L., fashioned a new eligibility *rule* (emphasis ours) to meet what it claimed were problems of the industry. *Hondo Drilling Co., N.S.L.*, 164 NLRB 67 (1967). In the *Carl B. King Drilling Company* case it called it a "new eligibility rule". (*Carl B. King Drilling Company*, 164 NLRB No. 68) The new eligibility rule is as follows:

> "All roughnecks who have been employed by employer for a minimum of ten (10) working days during the ninety (90) calendar day period preceding the issuance of our decision and direction of election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on employer's payroll list immediately preceding the issuance of the Regional Director's notice of election." *Hondo Drilling Company, N.S.L.*, 164 NLRB No. 67 (1967).

The facts upon which the Board fashioned its rule are as follows:

Hondo operated five drilling rigs, only two or three of which were in operation at any given time. Each rig required nine (9) roughnecks in its day-to-day operation. Hondo is classified as a "small rig company" because its equipment is capable of drilling only to a depth of 11,000'. The time necessary to complete a drilling job varies from a minimum time of ten (10) days to a maximum of thirty (30) days and an average of eighteen (18) days. When the particular job has been completed, the rig is "stacked" (taken out of service) until such time as it is needed to be transferred to a new drilling site. When the rig is again placed in operation, it may be stationed at a site many miles distant from its former location and, as a consequence, a sizeable number of the crew members are hired in the general area of the drilling site. Its employees are terminated at the end of each job but enough of its key roughnecks remain available to permit it to provide operating crews for two (2) rigs.

During the period prior to the representation hearing, Hondo employed a total of 224 roughnecks who worked an average of 34 days. Fifty-three of the 224 worked on 2 or more rigs averaging 88 days per man. Seventy-one worked less than 10 days and 104 voluntarily quit their employment before completion of the job on which they were working.

Although Hondo maintains an almost continuous drilling operation, the amount of time spent on a single drilling job is relatively short. All employees who have not been terminated for cause or who have not quit voluntarily before the completion of the particular job are considered eligible for re-employment with Hondo. A significant number of these employees have maintained a continuing interest in employment with Hondo, as is evidenced by the fact that they have accepted re-employment and have worked a substantial number of days during the year. (*Hondo Drilling Co., N.S.L., supra.*)

On the same day the Board handed down its decision in *Carl B. King Drilling Company*, 164 NLRB #68, citing the following facts:

> "King owns and operates four heavy duty oil rigs which have the capability of drilling to a depth of 20,000' The operation of such a rig requires the services of a crew, comprising a driller and four crew members, who are generally referred to as "roughnecks". As operations are carried out on a three shift basis, each rig requires a work force of . . . 12 roughnecks. . . ."
>
> "The employer was engaged in continuous drilling operations for the period from July 19, 1965, to July 31, 1966, and during this time it averaged 1.81 rigs and a work force of 22 roughnecks. The record shows that under normal conditions a derrick will operate at least

60-70 days at one location and that it may operate for as long as 293 days at one drilling site. At no time during this period did the employer have more than 3 rigs in operation and as a result the maximum number of roughnecks employed at any given time was 36 . . ."

" . . . If a roughneck quits or is terminated for cause before the completion of the job, he is not acceptable for re-employment by King. On the other hand, if a roughneck does stay to the completion of the job and has otherwise performed to the satisfaction of the driller, he is considered eligible for re-employment on the next drilling job. During the period from July 19, 1965, to July 31, 1966, King employed a total of 174 roughnecks. Of this number 21 were employees who are regularly available for work with King and who worked an average of 201 days per year. Of the remaining 153 roughnecks employed 89% had no prior employment history with King. The average number of days worked by the 174 roughnecks was 44 days, and only 48 roughnecks of the total employee complement worked 44 days or more."

"The employer has a hospitalization and vacation program for its employees. To qualify for hospitalization benefits, a roughneck must work at least 180 days over a 2 year period and accept employment when work is available. To qualify for vacation benefits, a rough-

> neck must accumulate 30 days of accrued time and be continually available for employment with King. Only approximately 12 roughnecks are currently receiving these benefits."

The Board then said:

> "For the reasons stated in that decision (Hondo), we believe that such a formula is appropriate in the circumstances of this case (King)."

The Regional Director for the Sixteenth Region of the NLRB and the Board itself have without exception followed the same rule for all elections (approximately twenty) of drilling companies in the Permian Basin.

Local 826, IUOE, AFL-CIO, filed a Petition for an election on March 8, 1967, with the 16th Region of the NLRB. The Regional Director conducted a representation hearing on June 22, 1967 at which time only the employer presented any evidence whatsoever pertaining to employees of the company. Employer filed a Brief with the Regional Director on July 6, 1967 and the Regional Director issued his Decision and Direction of Election on August 29, 1967, and followed the *Hondo* rule of eligibility (App. III, pp. 135-138) at or about the same time the Regional Director issued three (3) other decisions and directions of elections and set four (4) simultaneous elections and held same on September 28, 1967. The Director used one (1) ballot box for the election at Hobbs, New Mexico where

Petitioner and the Coral Drilling Company had a common voting place. (App. III, pp. 139-142) Although the Decision and Direction of Election directed both union and company to cooperate to the fullest extent in the preparation of eligibility lists in line with the spirit of the *Excelsior Underwear, Inc.*, case (156 NLRB 1236) (App. III, pp. 135-138) the union failed to do so and the Regional Director failed to require it. (App. III, pp. 149-163)

At the pre-election conference the Board Agent denied employer the right to object or challenge any person made eligible to vote solely under the *Hondo* rule. Petitioner timely filed objections to the election (App. III, pp. 145-148) but the objections were dismissed in the Regional Director's Supplemental Decision and Order and the Acting Regional Director's Second Supplemental Decision and Order after little, if any, *ex parte* investigation (App. III, pp. 149-163), constituting no part of this record. Petitioner timely filed request for review of the Regional Director's supplemental decision and order on December 19, 1967 and to his second supplemental decision and order, on January 19, 1968, both of which were denied by telegram. (App. III, p. 190) Subsequently, the Board filed a complaint alleging unfair labor practice for refusing to bargain. Petitioner filed its answer; general counsel filed motion for summary judgment; Petitioner filed answer to order to show cause; and subsequently the Trial Examiner granted a summary judgment from which Petitioner took exception at the Board level. The Board substained its Trial Examiner and adopted his recommended order on January 17, 1969. (App. III, p. 191)

REASONS FOR GRANTING THE WRIT

1. The decision below and the decisions in Rod Ric Corporation and Tri-Service Drilling Company-Brahaney Drilling Company, supra, have decided important questions under the Labor Management Relations Act and Administrative Procedure Act, which have not been settled by this Court. In all of the cases above, the NLRB, with approval of the appellate courts (Fifth Circuit and Tenth Circuit) has failed to protect the rights of employees under the Act. As a result the rights of employees have been jeopardized by the NLRB. This was done by permitting non-employees to vote and thereby subjected employees to the coercive power of the union and the NLRB.

The courts below erroneously extended the meaning of Section 9(c) of the Labor Act and erroneously interpreted the court's power and responsibility for judicial review of the actions of the NLRB in its decisions to enforce the orders requiring the subject employers to bargain with the union.

The Congress in Section 9(f) of the Act provided an exception whereby an employer in the building and construction industries and the union could make an agreement covering the employer's employees without establishing the union's majority. No such exception was made for the drilling industry. It follows the drilling industry, and particularly this company, should be treated the same as any manufacturing plant and not as a part of the construction industry.

Moran operates five (5) drilling rigs with four in operation on a daily average requiring nine roughnecks per rig or an average complement of thirty-six. It drills wells to a maximum depth of 10,000' and the average length of the job in days is ten to fifty, with an average of twenty-six days. Roughnecks are not terminated at the end of the well but are put on laid-off status or transferred to a different rig. Roughnecks are not hired on a well-to-well basis but on a permanent basis. All are hired in Hobbs, New Mexico and there is an average need of 36 roughnecks. There was a total work force of 228 in the year preceding the direction of the election. The company operates in an area within 95 to 100 miles of Hobbs, New Mexico with a major part 50 miles or less. There are 19 to 22 regular roughnecks employed. No rig operated less than 205 days and the company drills about 50 wells per year. The rigs averaged 282 days in the year. Fifteen of the roughnecks were employed in excess of one year; 11 unit employees were in the pension program and 6 would be added at the end of the current year. The pension program requires one year of service which means working at least 180 days during the year and being employed at the end of the year. The hospitalization program requires work in each pay period in the last 90 days before going on the program. (App. I, pp. 14-20 and Exh. in App. II.) Thirty to thirty-six roughnecks could have worked a minimum of 264 days and a maximum of 357 days during the 15-month period prior to the election. (App. I, pp. 24-25) Since half of the required crew complement worked on a steady basis, the other 18 roughneck jobs required approximately 200 people. Obviously, those 200 men do not have a continuing interest in the employment conditions of

the company. It would be the rankest kind of injustice to permit those 200 men to determine the rights of the steady 20 employees. There is no instability of employment as asserted by the Board and the Court below but merely unstable employees. It is the unstable employees the NLRB and the union needs and wants to vote in an election.

There are few industrial establishments in the country operating as consistently or providing more stable employment opportunities than Moran.

Making non-employees eligible to vote dilutes the voting rights of the regular employees and thereby decreases the voting power of the employees. It violates the "one man-one vote" philosophy. By allowing a person to vote who works only 10 days in 90 permits the union to have a small cadre of members to go from one company to another, work 10 days to completion of a well at each company, vote in each company's election, and thereby swing the election for the union. Thus, under such circumstances, the union could be the bargaining agent in many companies and not actually represent a majority of the employees in any company. The interests in working conditions of regular or permanent type employees are greatly different from the intermittent or one-time employee. The one wants long range benefits, such as vacations, hospital and medical insurance, etc.; while the other wants immediate wages and immediate benefits. This conflict should be resolved in favor of permanent-type employees, otherwise the purposes of the Act will be defeated. This will not lead to industrial harmony but to industrial strife. A great deal is heard of equal rights

but the NLRB apparently thinks no rights are violated by "stacking the cards" in favor of union management and against individual employees.

Furthermore, the eligibility rule as set out in the "Decision and Direction of Election" and the "Notice of Election" would preclude anyone from voting who came to work for the company after the payroll period ending prior to September 7, 1967 even though such person was still employed on election day. (App. III, pp. 135-142) This fact alone should be cause to void the election and the eligibility rule.

Given the turnover reflected in the record in these cases, it should be easy to see, within a very short period of time few persons who voted in the election would still be employed. Yet, the union would still be the bargaining agent for the employees of the company even though such employees did not vote for the union. At the present time, it is highly unlikely that more than 1 2 of the voters in this case are still working for the company since the election was held 39 months ago. (Sept. of 1967)

Section 9(c) of the Act only authorizes the Board to determine whether a question of representation exists; to determine the proper unit for bargaining; and to direct an election. In this case the Board determined the proper unit for bargaining was:

> "All derrickmen, motormen, and floorhands, otherwise referred to as roughnecks, employed by the employer in drilling operations in the area generally known as the Permian Basin,

excluding all toolpushers, drillers, office employees, technical employees, guards, professional employees, and all supervisors as defined in the Act." (App. II, pp. 135-138)

Petitioner has found no fault with the appropriate unit or that an election should have been directed. The fault it finds is in the determination that former employees are eligible to vote and determine the rights with respect to working conditions of the actual employees of the company.

The Court below indicated if the Board had abused its discretion in determining who were eligible to vote, it might have overturned or refused to enforce the Board's order. It is submitted the Board did abuse its discretion and the Court below failed to consider the facts in the cases before it and their application and comparison with the *Hondo* case. Further the Court below misinterpreted the facts in the instant case and apparently did not understand the significance of the facts involved.

It is submitted the Board has abused its discretion and acted arbitrarily and capriciously.

2. The lower Court was in error when it failed to consider all of the defenses raised by Petitioner.

(a) Section 160(b) of the Labor Management Relations Act, provides for a hearing in an unfair labor practice case and that the person complained of shall have the right to appear in person or otherwise and give testimony at

the place and time fixed in the complaint. Petitioner was denied this right and even though set out in its answer to the petition for enforcement, the lower Court failed to consider it.

(b) Although Petitioner herein filed numerous objections to the election which the Board overruled, there is no evidence in the record to support the Board's overruling of Respondent's objections.

Section 160(b) (Section 10(b) of the Act) requires the testimony to be reduced to writing and filed with the Board and the Board should make its decision upon the preponderance of the testimony taken. No such record was made.

(c) There is no evidence in the record to sustain the Board's overruling of Petitioner's objections to the election.

(d) The lower Court refused to consider the allegation that the Board denied Petitioner the right to challenge voters whom it considered ineligible to vote. Such denial contravenes the Board's own Field Manual instructions regarding challenges. (See excerpts from NLRB Field Manual 11338 et seq. found in the Appendix, pp. 9a to 13a.)

The Act requires the Board's findings with respect to questions of fact to be supported by substantial evidence on the record:

> "Findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." (29 U.S.C.A. Sec. 160(e))

This Court has held the Court of Appeals should guard against the Board's tendency to shut off a party's rights to produce evidence or conduct cross-examination material to the fact issues raised, and to require that before a party's rights are finally foreclosed, his case has been fairly heard and findings cannot be said to have been fairly reached unless material evidence which might impeach the Board's findings is heard and weighed. *NLRB vs. Indiana & Michigan Electric Company*, 318 U.S. 9, 28; 63 S.Ct. 394, 405 (1943).

3. The decision below should be reviewed because the Board refused to grant a hearing on the fact issues raised concerning the conduct of the election. It did this through the granting of a summary judgment. Neither the Labor Act, the Administrative Procedure Act, nor the Board's own Rules and Regulations authorize such procedure. This is wholly contrary to the system of justice and procedure followed in this country for nearly 200 years and is a denial of due process. Here is an administrative agency which: adopts a rule without following the Administrative Procedure Act; directs and conducts an election (contrary to its normal rules and procedures); has its own investigators conduct some sort of investigation, none of which information is in the record; another Board employee makes the decision overruling objections filed by the employer; the Board then sustains its Regional Di-

rector after exceptions have been filed by employer; then the Board files unfair labor charges against the employer through the Regional Director; it trial examiner grants the Board a summary judgment without permitting the employer to make a record; and then the Board sustains the trial examiner. In other words, the National Labor Relations Board acts as the initial mover in the election, investigates its own activities and then judges its own activities.

Such procedure may be expedient from an administrative standpoint, but it would be very difficult to call it justice. The Court below misconstrued its responsibility and power of review. It took the position the employer had been given an opportunity to present evidence and to cross-examine under oath. It was not. The action of the Board and the Court below amounts to "rubber stamping" the ex parte investigations and actions of the Regional Director, contrary to Section 10(e) of the Act.

4. The decision below should be reviewed because the Board overruled Petitioner's objections to the conduct of the election without substantial evidence in the record, contrary to the Section 10(e) of the Act. The same reasons as set forth in 2 and 3 above are applicable here.

5. The NLRB should be required to follow the rule-making procedure of the Administrative Procedure Act when it establishes a voting eligibility rule for an entire industry which is contrary to its usual rules of eligibility.

The lower Court erred in holding the Board did not adopt a rule in violation of the Administrative Procedure Act when it fashioned a formula in the Hondo case and in following *NLRB vs. Hondo Drilling Company*, 5th Cir., 1970 No. 27943, June 16, 1970). The Board itself called the formula a "rule" in *King Drilling Company* case, *supra*. The Board and the lower Court chose to ignore the complete differences between the employment practices in Petitioner herein and the *Hondo* and *King* drilling company cases.

When the NLRB, without exception, applies the same eligibility rule in every election held in the Permian Basin after its *Hondo* decision, even though some companies had only deep well rigs, some only intermediate, some only small rigs and some combination rigs; and even though employment practices varied greatly from Hondo's; it becomes perfectly clear the Board established and followed a set rule (a list of some of those cases is in the Petition of Tri-Service Drilling Company, supra).

If the Board had not fashioned a rule of eligibility for the entire drilling industry, as stated in the *King Drilling Company case*, then under the facts of this case an entirely different rule would apply. It is submitted, when the Board establishes a rule of general applicability it must follow the Administrative Procedure Act.

6. The avowed purpose of the Board's rule in *Excelsior Underwear Inc.* case (156 NLRB 1236) was to make it possible for the employees to hear both sides of the question. The Board should be required to follow the spirit as well as the letter of that rule when the employer has no direct access to persons no longer em-

ployed by it but whom the Board makes eligible to vote. The *Excelsior* rule applied primarily to plants where employers had access to the names and addresses of all the employees because they remained constantly employed. The unions, in those situations perhaps did not have such lists. In the instant case, the Board has made people eligible to vote who are no longer working for the employer but who were probably available to the union. Otherwise, why would it want them eligible? The notice setting up this election stated that it was a combination election by way of mail ballot or manual ballot. (App. III, p. 142) It was obvious to the director some of the eligible people might no longer live in Hobbs, New Mexico. Under the circumstances if the employer is required to furnish names and addresses, the union should be also. As a matter of fact the Decision and Direction of Election did so require but the Regional Director did not enforce his direction; the Board refused to require it and the lower Court refused to require it.

The lower Court misinterpreted the direction to furnish the names and addresses of all eligible voters by the Union as well as the employer as set forth in the Decision and Direction of Election. It stated:

> "In view of the nature of the employment in this industry, both the Union and the Employer are directed to cooperate to the fullest extent in the preparation and compilation of an election eligibility list containing the names and addresses of all eligible voters. In addition, we shall require that an election eligibility list containing the names and addresses of all known eligible voters be filed by the Employer

> with the Regional Director within seven (7) days after the date of this Decision and Direction of Election, and that a supplemental list containing the names and addresses of the remaining eligible voters be filed by the Employer with said Regional Director within seven (7) days after the issuance of the Notice of Election by the Regional Director. No extension of time to file these lists shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with these requirements shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB 1236."

It will be noted the foregoing is one complete paragraph. There is no distinguishment between the various lists required. The *Excelsior* rule was established for the purpose of allowing the eligible voters to hear both sides of the question. (See *NLRB vs. Wyman-Gordon Co.*, 394 U.S. 759, (1969)).

7. The decision below has clearly failed to consider the constitutional rights of the actual employees of this Petitioner. It is the rights of employees under the Act that are to be protected. The right of a person to contract with respect to his employment is a property right protected under the Fifth Amendment to the Constitution of the United States. This right has been limited by the Labor Management Relations Act, but it has not been destroyed by such Act. However, in this case, the Board, with the concurrence of the Court below, would destroy entirely the rights of actual employees of Petitioner by permitting persons who are

no longer employed by Petitioner, who have no expectancy of future employment, and who have no continuing interest in the working conditions of Petitioner, to determine whether or not the actual employees are to be represented by a union and to negotiate a contract for them. Under the facts shown, if Petitioner is ordered to bargain, it is almost certain the union will negotiate a contract for employees it does not now represent and probably never represented. Wherein is there any limitation upon the power of the Board to permit non-employees to vote?

It has been more than three years since the election. Surely, under the circumstances, it would not serve the purposes of the Act to require the present employees to be represented by Local 826 without a new election and one limited to those employees who have a continuing interest in the working conditions of Petitioner. Furthermore, even after such an election, the union should be required to prove its majority representation annually.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies each of Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in the herein styled case was mailed to each of the following on the ____ day of December, A.D., 1970:

Solicitor General of the
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Honorable Marcel Mallet-
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APPENDIX

A. FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No persons shall . . . be deprived of life, liberty, or property, without due process of law, . . .

B. LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED (29 U.S.C., 152, 157, 159, 160, ET SEQ.)

§ 152. Definitions

When used in this subchapter —

. . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any

individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

...

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

...

§ 159. Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such unit for the purposes of collective bar-

gaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: ...

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: ...

C. ADMINISTRATIVE PROCEDURE ACT, (5 U.S.C.A. Sections 552(a) (1) (D) and (E); 553; and 554)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

...

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of

general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

...

§ 553. Rule making

...

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule-making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

...

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceedings shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or pro-

posals of adjustment when time, the nature of the proceedings, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This sub-section does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966, 8 Stat. 384.

...

D. NATIONAL LABOR RELATIONS BOARD FIELD MANUAL PARA. 11,338

...

11338 Challenges: The challenge procedure provides a method whereby a voter's eligibility to vote may be called into question, the ruling on the question may be at least temporarily reserved, and the questioned voter may memorialize his desires in the event his desires should have relevance in the future — all without disrupting the regular flow of votes.

Any observer has the right to challenge a voter for cause. The Board agent must challenge anyone whose name is not on the eligibility list. Also, he must chal-

lenge a voter if he knows or has reason to believe that the voter is ineligible to vote, but, in this instance, he should not challenge until and unless none of the parties voices a challenge. The Board Agent will not make challenges on behalf of the parties, whether or not such parties have observers present.

The reasons for the challenge should be stated at the time the challenge is made.

11338.1 Challenge procedure: When a voter is challenged, a small "c" is placed beside his name by the checking observers. (If his name does not appear on the list, it should be added, in a supplemental list, and the "c" inserted.) The Board agent (at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope — the voter's name, clock number, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger and his (the agent's) initials. If time permits, he may elicit specific information surrounding the voter's status, for insertion on the reverse side of the stub, there to be initialed by the voter.

The voter is then given a ballot and instructed to enter the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. Upon his return to the voting table, he is given a challenged ballot envelope. The *voter* places the marked ballot in the envelope, seals the envelope, and drops it in the box. Observers stationed at the voting booth area and/or the ballot box should make sure that the chal-

lenged voter, when he comes out of the booth, goes to the voting table and does not drop the ballot in the box before placing it in the envelope, and *sealing* the envelope.

11338.2 Notation of potential challenges: Observers may maintain lists of persons they intend to challenge, but the better practice is to permit the parties to note on the eligibility list, at the preelection check, the persons they intend to challenge. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election.

11338.3 Proper time to challenge: Challenges should be handled as they come up. Challenged voters should not be told to return later, and they should not be allowed to congregate in the polling place awaiting a slack period.

In the oral instructions to observers, they should be urged to challenge as the voter comes up to the checking table. Normally, a challenge should be made before the questioned voter receives a ballot.

11338.4 Merit of challenge should not be argued: Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly, and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter, quickly and lucidly, the measures which will be taken to protect the secrecy of the challenged ballot.

11338.5 Exclusions in decision: Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge. The Board agent must exercise discretion in deciding whether to allow a vote (under challenge) when the person presents plausible reasons for being permitted to vote despite the exclusion, or if his actually being within the excluded group is not without question.

. . .

11340 Count

11340.1 Time and place: The count should take place as soon after the close of voting as possible.

If a number of polling places are involved, the count should not begin until all ballot boxes have been collected. If the voting hours have been long and arduous, if the count is expected to be drawn out (see below), and if the personnel participating in the count are the same as those who participated in the conduct of the election, the Board agent may allow a rest or meal period before the count. When there is any intervening interval extreme pains should be taken not only in preserving the intactness of the ballot box(es) but also in displaying this fact.

The count may take place at any centrally located place. Typically, in the small election, the count is taken at the polling place. In large elections, if one of the polling places is large enough, the tally can take place there.

11340.2 Persons present: The actual participants in the count are the Board agents and official observers, in the number necessary.

Also present may be members of the press and other interested persons to the extent permitted by the physical facilities. The Board agent in charge of the election should use his discretion in limiting numbers.

11340.3 "Clearing" challenges: Prior to the count, the parties may wish to dispose of some challenged ballots (i.e., remove the challenge) by consent. Any such desires should be encouraged by the Board agent, but should not be *urged* by him if there is reluctance in any quarter.

Such clearance, on behalf of each party, should be done by someone specifically authorized so to act, not merely by any of the observers.

Finally, a challenging party may withdraw from his position on the basis of discussion with the Board Agent and other parties. In such event, though, other parties should be given the opportunity to challenge the same voter.

However — this is important — a challenge-clearance situation should not be allowed (1) to devolve into an argument on the merits, or (2) to delay the count unduly.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEP. TERM, 1970

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus
No. 686-69

MORAN OIL PRODUCING AND
DRILLING CORPORATION,
Respondent.

Filed: Sept. 30, 1970

On Application for Enforcement of an Order of the National Labor Relations Board

Paul Spielberg (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Lawrence H. Pelofsky, Attorney, National Labor Relations Board, on the brief) for Petitioner.

Joseph Connally (Turpin, Smith, Dyer, Hardie & Harman on the brief) for Respondent.

Before JONES*, BREITENSTEIN and HOLLOWAY, Circuit Judges.

*Of the Fifth Circuit, sitting by designation.

BREITENSTEIN, Circuit Judge.

The National Labor Relations Board petitions for the enforcement of an order entered upon a finding that respondent Moran Oil Producing and Drilling Corporation had violated § 8(a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a) (5) and (1), by refusing to bargain with the duly certified representative of its employees. The Company admits the refusal to bargain and attacks the certification.

The Company drills oil wells for major oil producers. It is located in Hobbs, New Mexico, and operates in the area known as the Permian Basin with five drilling rigs, four of which are in operation at any given time. On each rig there is a four-man crew comprised of one driller, who is a supervisory employee, and three roughnecks. Because drilling is a continuous operation, the Company runs three shifts and for each rig there is a daily complement of three drillers and nine roughnecks. Drilling jobs average 26 days each. In spite of the Company's efforts to retain experienced personnel by transferring drilling crews from one job to another, there is a high turnover of workers. In the 15 months before the representation hearing, 255 men were required to fill approximately 36 roughneck slots. Of this number 17 were substantially full-time employees; 56 worked on two or more separate occasions; and the remaining 186 worked on one occasion and did not seek or accept employment with the Company thereafter.

Upon the petition of Local 826, International Union of Operating Engineers, AFL-CIO, for certification as

collective bargaining agent, the Regional Director held a representation hearing. He found that the Company's operations and employment experiences fell within the concept of instability of employment common to the oil industry in the Permian Basin. In determining voter eligibility, he applied what is referred to as the Hondo formula. Under it, employees eligible to vote are those (1) who had been employed by the Company at least 10 working days during the 90 calendar days preceding the direction of election unless they had subsequently been discharged or had quit the job, and (2) those whose names appeared on the Company's payroll immediately before the notice of election. The Company did not seek Board review of the Director's decision as is permitted by the Regulations. See 29 CFR § 102.67 (b).

After the election went in favor of the Union, the Company filed timely objections and an administrative investigation was made. The Director sustained some challenges to votes cast and denied others. The Board denied the Company's request for review of the Director's rulings on the challenged ballots. The revised tally showed 23 votes for and 21 against Union representation. Subsequently, the Board denied the Company's petition for review on the ground that it raised no substantial issues and certified the Union as the bargaining representative.

The Company refused to recognize and bargain with the Union which filed charges for a violation of § 8(a) (5) and (1). The Company's answer renewed its objections to the representation proceedings. The General

Counsel moved for a summary judgment on the ground that the issues raised had been decided in the representation proceedings. In opposition the Company contended that a hearing was required on certain of its contentions. The Examiner granted the motion for summary judgment and his decision was upheld by the Board which entered the conventional order requiring bargaining and posting of notices. See 174 NLRB No. 26.

The Company argues that summary disposition was improper because, in the unfair labor practice proceedings, it was entitled to an evidentiary hearing on the correctness of the Director's representation determinations. The same contention has been presented to us in the cases of Meyer Dairy, Inc. v. National Labor Relations Board, 10 Cir., F.2d , National Labor Relations Board v. Gold Spot Dairy, Inc., 10 Cir., F.2d , and National Labor Relations Board v. Jackson Farmers, Inc., 10 Cir., F.2d . We have held that under § 3(b) the Board can delegate its unit determination functions to the regional director; that the decisions of the latter, if not set aside by the Board, are entitled to the same weight as Board determination; and that the limited review provided by 29 CFR § 102.67 applied to Board review of any delegated action of a regional director. The Company does not claim that it has any newly discovered or previously unavailable evidence or that it was foreclosed from presenting any substantial and material evidence at the representation proceedings. Under the authorities cited, the matter was ripe for determination on the motion for summary judgment.

The main thrust of the Company's argument is against the use of the Hondo formula. It was developed because of the instability of employment in the Permian Basin oil well drilling operations and has recently been approved by the Fifth Circuit in National Labor Relations Board v. Hondo Drilling Company, 5 Cir., ___ F.2d ___, and National Labor Relations Board v. Rod-Ric Corporation, 5 Cir., ___ F.2d ___. In Hondo, the court said that "the eligibility formula appears reasonably calculated to enfranchise those roughnecks with a legitimate interest in the terms and condition of employment in the bargaining unit." We agree.

The Company argues against the application of the Hondo formula in this case because of the stability of its operations. It points out that its five rigs "averaged 77.21% occupancy throughout the year, or in other words that such rigs averaged operating 282 days per year," and contends that the Director and the Board confused stable employment opportunity with unstable employees. The application of this formula to the Company enfranchised 45 employees in addition to 17 full-time workers. We are convinced that this formula takes into account the workers who have a history of substantial employment and a reasonable expectancy of future employment and excludes those who have no recent employment and little or no likelihood of re-employment by the Company. The use of the formula accords with the rule that right to vote in a representation election depends on whether an employee is "sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a bargaining agent." National

Labor Relations Board v. George Groh and Sons, 10 Cir., 329 F.2d 265, 268.

The Company argues further that the Hondo formula is a special eligibility rule for application to drilling companies throughout the Permian Basin and was promulgated without regard to the rule making requirements of the Administrative Procedure Act, 5 U.S.C. § 553. We believe that in announcing the Hondo formula the Board was engaged in adjudication and not in rule making. The Board developed an eligibility formula adapted to the specific facts in the Hondo case and applied it to the election therein. In the case at bar the Board has used the same formula. In our opinion there is no significant difference between the facts in Hondo and those appearing here. We agree with the Fifth Circuit that "in fashioning the Hondo eligibility formula, in the course of the Hondo representation proceedings, the Board did not engage in rule-making within the meaning of the Administrative Procedure Act." See National Labor Relations Board v. Hondo Drilling Company, supra. We conclude that the use of the formula on the facts presented was well within the wide discretion of the Board to determine an appropriate bargaining unit and the eligibility of those entitled to vote at a representation election. The actions of the Board were neither capricious nor arbitrary and must be sustained. National Labor Relations Board v. Jackson Farmers, Inc., 10 Cir., ___ F.2d ___.

The Company also argues that the election should be set aside because of the Union's failure to furnish names and addresses of eligible voters. In his Direction of Election the Director said that because of "the na-

ture of the employment in this industry" the Company and the Union "should co-operate to the fullest extent possible" in the compilation of an eligibility list. Additionally, the Company was ordered to file with the Director the so-called Excelsior list of names and addresses of eligible voters. See Excelsior Underwear, Inc., 156 NLRB 1236. After the Company had complied, the Director requested that the Union furnish any addresses in its possession which differed from the Company list. The Union reported to the Director's office that it had no such addresses. Through inadvertence the Regional Office did not inform the Company of the report. The Company now contends that the Union's failure to supply addresses deprived it of an opportunity to communicate with a number of persons who were allowed to vote under the Hondo formula and for whom the Company did not have a current address. There is no showing that in fact the Union had addresses which it failed to disclose.

Under Excelsior, the Union was under no obligation to furnish the list unless the Board so ordered specifically. Under the directive for the election in this case the Union was required only to "cooperate" in compiling the eligibility list. Hence, the Excelsior principle does not apply. See National Labor Relations Board v. Hondo Drilling Company, supra, and National Labor Relations Board v. Rod-Ric Corporation, supra. We are satisfied that the Union complied with the directive and that the Company has no ground for complaint.

The order of the Board will be enforced.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus No. 686-69

MORAN OIL PRODUCING AND
DRILLING CORPORATION,
Respondent.

Filed: Oct. 26, 1970

JUDGMENT

Before: Jones,* Breitenstein and Holloway, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent Moran Oil Producing and Drilling Corporation, its officers, agents, successors, and assigns on January 17, 1969. The Court heard argument of respective counsel on July 7, 1970, and has considered the briefs and transcript of record filed in this cause. On September 30, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Ap-

*Of the Fifth Circuit, sitting by designation.

peals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Moran Oil Producing and Drilling Corporation, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

(Signed) JEAN S. BREITENSTEIN
Judge, United States Court of
Appeals for the Tenth Circuit

DATED: October 26, 1970

NOVEMBER TERM — DECEMBER 1, 1970

Before Honorable Jean S. Breitenstein, Circuit Judge.

National Labor Relations Board,
Petitioner,
versus
No. 686-69

Moran Oil Producing and Drilling Corporation,
Respondent.

Upon application, it is ordered that the mandate of this court issued on November 27, 1970, be and the same is hereby recalled.

It is further ordered that the mandate is hereby stayed in accordance with the provisions of Rule 41 (b), Federal Rules of Appellate Procedure, pending certiorari.